85-967

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

ROBERT T. and EDNA L. SMITH

Appellants

Vs.

UNITED STATES OF AMERICA

Appellee

ON APPEAL FROM THE U.S. COURT OF APPEALS, ELEVENTH CIRCUIT
JURISDICTIONAL STATEMENT

ROBERT T. SMITH, PRO SE

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QUESTIONS PRESENTED

1. Whether the Internal Revenue Service of the Department of the Treasury has the authority to issue a Notice of Deficiency (26 U.S.C. 6212) when they have not followed the due process of law provisions of the Internal Revenue Code (26 U.S.C. 7602(a)(2)), and whether the district court and the court of appeals were clearly erroneous in allowing this.

2. Whether the district court and the court of appeals were clearly erroneous in refusing to grant respondents their Fourth and Fifth Amendment rights under the Constitution of these United States when a valid claim of right had been made by respondents.

LIST OF PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED.

The Honorable Orinda D. Evans
U.S. District Judge
U.S. District Court for the Northern District of Georgia
Atlanta, Georgia 30335

The Honorable John C. Godbold, James C. Hill, R. Lanier Anderson, Gerald B. Tjoflat, and Joseph Hatchett, Circuit Judges.
U.S. Court of Appeals, Eleventh Circuit
Atlanta, Georgia 30335

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Wayne Belnap vs. U.S., ET AL C149-71, ; U.S. District Court, District of Utah, 10/22/71

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U.S. vs. Goodner D.C. Colo. 1940, 35 F. Supp. 286

Brumfield vs. State Tex. Cr. App. 1969, 445 S.W. 2d 732

STATUTES

26 U.S.C. 6212

26 U.S.C. 7602 (a)(2)

JURISDICTION

This is an appeal of an order of the U.S. Court of Appeals, Eleventh Circuit, and the Supreme Court's jurisdiction is invoked under 28 U.S.C. 1252, 28 U.S.C. 1254 (3), 26 U.S.C. 6212, 26 U.S.C. 7602, and the Fourth and Fifth Amendments to the Constitution of these United States.

Final order of the district court was issued on March 29, 1985. Respondents timely filed an appeal and the appeal court final order was issued on August 8, 1985. A request for en banc hearing was denied on October 1, 1985. Respondents filed an appeal to the U.S. Supreme Court on September 11, 1985.

STATUTES INVOLVED

As provided by Supreme Court Rule 15.1(f), the verbatim quotations of the following sections of the Internal Revenue Code are set forth in Appendix A and B hereto:

26 U.S.C. 6212

26 U.S.C. 7602

Constitution of the United States, Fourth Amendment

Constitution of the United States, Fifth Amendment

STATEMENT OF THE CASE

This action arises from an Internal Revenue Service (Department of the Treasury) summons issued at an un-named date in 1982 against the defendants. The defendants answered the summons and asked for immunity from criminal prosecution before they would produce their books and records or give oral testimony. IRS declined to do this, and the defendants refused to produce any records or give complete testimony under the protection of the Fifth Amendment to the Constitution of the United States.

IRS then sought to enforce the summons through a petition to the U.S. District Court, Northern District of Georgia, Judge Orinda Evans presiding. Judge Evans ordered two in-camera investigations of the defendants records, and held one meeting in her chambers. She then ordered the defendants, under threat of contempt of court, to turn their records over to IRS, and ordered IRS

to examine the records and tell her if there was anything incriminating in them.

Judge Evans issued her order on March 29, 1985 and the respondents asked her if they could file a motion for a stay of her order until an appeal could be filed. She said that if such a motion were made she would deny it. Therefore respondents did not file a motion to stay her order. Respondents turned over their records to the Internal Revenue Service, but did not give oral testimony as is required by 26. U.S.C. 7602 (a)(2).

Respondents filed an appeal to Judge Evans' order and the government filed a motion to dismiss. The Eleventh Circuit Court of Appeals granted the government's motion in an order dated August 8, 1985. Respondents filed a motion for en banc hearing and reconsideration, and this was denied on October 1, 1985. This appeal to the U.S. Supreme Court is from the order of August 8, 1985.

On May 30, 1985 the Internal Revenue Service issued a Notice of Deficiency (26 U.S.C. 6212) in violation of Judge Evans' order of March 29, 1985 and in violation of 26 U.S.C. 7602 (a)(2).

A STATEMENT OF REASONS WHY QUESTIONS PRESENTED ARE SUBSTANTIAL

This case is complicated because of the manner in which it was handled by the district court and court of appeals and the action of the Internal Revenue Service in issuing a Notice of Deficiency when they did not have sufficient lawful grounds to do so.

The district court judge ordered two in-camera investigations in which the respondents were required to present each document in their books and records and show why each one would tend to incriminate them. Respondent Robert T. Smith, an experienced government investigator, knew that, in criminal investigations no single element of proof is likely to be incriminating, but that, taken as a whole (like pieces of a puzzle) they would create sufficient evidence to allow successful prosecution.

The respondents could not state which individual document or which item of oral testimony might be incriminating, but they knew that, taken as a whole, there was a high possibility for a criminal prosecution. IRS claimed that their investigation was civil and that no Justice Department referral had been made, but did admit that anything uncovered in their civil investigation would be used in any subsequent criminal investigation and that the investigation could move from civil to criminal with one phone call to an IRS special agent. Thus, the respondents are in the position of having the district court order them to turn over their records in a civil investigation (but refused to allow IRS to take oral testimony (26 U.S.C. 7602(a)(2)), and then have the possibility this will be used in a criminal investigation.

The procedure is in direct violation of the provisions of the Fourth and Fifth Amendments to the Constitution of the United States. The district court was clearly erroneous to aid IRS in circumventing these Constitutional Amendments in a civil investigation that could easily lead to a criminal one.

When IRS issued the Notice of Deficiency to respondents they clearly violated Judge Evans' order to examine the records and tell her if they were incriminating, or if they thought they might be. To the knowledge of respondents IRS never told Judge Evans anything, but instead issued a Notice of Deficiency based only on the records they reviewed, but without taking oral testimony as is required by 26 U.S.C. 7602 (a)(2).

The respondents request oral argument before the Supreme Court before the Court reaches a decision in this matter. The relief sought is to reverse the orders of the Court of Appeals and the District Court and issue an injunction to IRS to withdraw their Notice of Deficiency with respect to respondents for the tax year in question (1981) and to cease and desist from any further action against respondents unless they have proper probable cause.

In view of the foregoing the respondents pray to the Court for the relief sought and any other such relief as the Court may find just and prudent.

Respectfully Submitted:

Robert T. Smith, Pro Se
2939 Highland Drive, S.E.
Smyrna, Georgia 30080
(404) 432-9431

REFERENCES

The respondents call the Court's attention to the APPELLANT BRIEF filed in the U.S. Court of Appeals, Eleventh Circuit and in particular the section entitled *Argument and Citations of Authority.* The repondents are requesting the entire record be transmitted because of the complexity of the issues raised in this case.

CERTIFICATE OF SERVICE

I certify this Jurisdicational Statement (three copies) have been served on the United States Court of Appeals for the Eleventh Circuit by causing the mailing of three copies enclosed in an envelope properly stamped and addressed as follows:

The Honorable Glenn L. Archer, Jr.
Assistant Attorney General, Tax Division
U.S. Department of Justice
Washington, D.C. 20530

This 5th day of November, 1985.

Robert T. Smith, Pro Se

APPENDIX

APPENDIX A

26 U.S.C. 6212 and 7602 (a)

Sec. 6212. Notice of deficiency.

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, 44, or 45, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Sec. 7602. Examination of books and witnesses.

(a) Authority to summon, etc.

For the purpose of ascertaining the correctiness of any return, making a return where none has has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

APPENDIX B

FOURTH AND FIFTH AMENDMENTS TO THE U.S. CONSTITUTION

AMENDMENT IV. (1791)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V. (1791)

No preson shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
vs.	:	CIVIL NO. C83-1562
	:	
ROBERT T. SMITH and	:	
EDNA L. SMITH	:	

ORDER

This case is before the court on the Report and Recommendation of Magistrate Castellani.

The government seeks to enforce an IRS subpoena requiring Respondents to produce certain documents relating to Repsondents' 1981 tax return and to testify at deposition regarding those documents. Respondents have claimed their Fifth Amendment right against self incrimination with regard to the documents, arguing that even though this is a civil investigation, information provided to the government could serve as the basis for future criminal prosecution.

The Magistrate originally held that Respondents had no Fifth Amendment privilege against producing documents, but that they could not be compelled to testify about the documents. This court disagreed, and directed the Magistrate to hold a hearing to the particular doucments sought and questions posed. Order of April 9, 1984.

Although the Magistrate apparently held a hearing

on April 30, 1984, his resulting Report and Recommendation does not indicate to what extent he investigated the particular incriminating nature of the documents at all. The language of the R&R suggests that the Magistrate merely relied on *United States v. Doe*, _____ U.S. _____, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) stating:

> While it is clear the government could seek those records from a third party, the magistrate does not believe the government can require the taxpayer to produce these documents becuase such production would be a testimonial act.

Report and Recommendation of October 24, 1984, p.2. To support a valid claim of privilege under the Fifth Amendment, however, it is clear that the act or information must be both testimonial *and* incriminating. *Fisher v. United States*, 425 U.S. 391, 410 (1976). In *Doe*, the government conceded that the act of production might be incriminating; the government does not so concede in this case.

The court therefore conducted its own *in camera* review of the documents and Respondents' claims at a hearing on March 28, 1984. Based on that hearing, the court finds that production of the documents would not confront Respondents with a "substantial and real" risk of incrimination. *Marchetti v. United States*, 390 U.S. 30, 53 (1968). The court DIRECTS Respondents to turn over to the government all documents in their possession sought by the IRS summons by noon, Monday, April 1, 1985[1]

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[1] Mr. Smith has informed the court that the documents were turned over pursuant to the court's direction on March 28, 1985 at the conclusion the the hearing.

As to further deposition of Respondents, the court finds it difficult to determine at this point whether such deposition would involve a real risk of self incrimination by Respondents. In addition, the government indicated at the hearing that it would not know whether such deposition would be necessary until the documents provided by Respondents have been reviewed. The court therefore DIRECTS that no further deposition of Repondents will be permitted until further order of the court.

SO ORDERED, this 29 day of March, 1985.

/S/ Orinda D. Evans
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8347

Entered: August 8, 1985
Spencer D. Mercer, Clerk

UNITED STATES OF AMERICA and
DEBORAH K. MATHIS, Revenue
Agent, Internal Revenue Service,

Plaintiffs-Appellees,

versus

ROBERT T. SMITH and
EDNA L. SMITH

Defendants-Appellants

Appeal from the United States District Court for the
Northern District of Georgia

Before TJOFLAT, VANCE and HATCHETT, Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss this appeal is granted.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8347

Entered: October 1, 1985
Spencer D. Mercer, Clerk
UNITED STATES OF AMERICA and
DEBORAH K. MATHIS, Revenue
Agent, Internal Revenue Service,

Plaintiffs-Appellees,

versus

ROBERT T. SMITH and
EDNA L. SMITH

Defendants-Appellants

Appeal from the United States District Court for the
Northern District of Georgia

Before GODBOLD, Chief Judge, HILL and ANDERSON, Circuit Judges.

BY THE COURT:

Appellee's petition for rehearing, treated as a motion for reconsideration of the order of August 8, 1985 is denied.

APPENDIX F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
ATLANTA, GEORGIA 30303

Docket No. 85-8347

UNITED STATES OF AMERICA and DEBORAH K. MATHIS, Revenue Agent, Internal Revenue Service,	)	
Plaintiffs-Appellees	)	
vs.	)	NOTICE OF APPEAL
ROBERT T. and EDNA L. SMITH	)	
Defendants-Appellants	)	

In accordance with paragraph 10.3 of the Rules of the Supreme Court of the United States, the defendants-appellants do hereby appeal the order of Justices Tjoflat, Vance, and Hatchett dated August 8, 1985 in the above captioned action. In accordance with paragraphy 13.1 of the Rules of the Supreme Court of the United States, the defendants-appellants request the Clerk of the U.S. Court of Appeals, Eleventh Circuit, to certify the entire record in this case and transmit it to the Supreme Court of the United States.

Date: September9, 1985

Respectfully Submitted:

/S/ Robert T. Smith
Robert T. Smith, Pro Se
2939 Highland Drive, S.E.
Smyrna, Georgia 30080
(404) 432-9431

Certificate of Service:

I certify that all interested person and opposing counsel have been mailed a copy of this notice of appeal on Sept. 9, 1985.

/S/ Robert T. Smith